No. 88-1972

Supreme Court, U.S.
FILED
NOV 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

LLOYD PERKINS,

Respondent.

On Writ of Certiorari To The Appellate Court Of Illinois, Fifth Judicial District

PETITIONER'S BRIEF ON THE MERITS

NEIL F. HARTIGAN
Attorney General
State of Illinois

ROBERT J. RUIZ
Solicitor General
State of Illinois

TERENCE M. MADSEN

MARCIA L. FRIEDL*
JACK DONATELLI
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2127

Counsel for Petitioner

*Counsel of Record

Petition for Writ of Certiorari Filed June 2, 1989
Certiorari Granted October 2, 1989

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

92 pp

QUESTION PRESENTED

Whether questioning by an undisclosed undercover agent constitutes *per se* custodial interrogation as contemplated by *Miranda* merely because the suspect is incarcerated?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 10

ARGUMENT:

MIRANDA DOES NOT PROHIBIT THE USE OF UNDERCOVER AGENTS TO ELICIT STATEMENTS FROM INCARCERATED SUSPECTS PARTICULARLY WHERE, AS HERE, THE ENCOUNTER IS DEVOID OF COMPELLING INFLUENCES 11

A.

Inmate Encounters With Persons They Do Not Know To Be Government Agents Do Not Carry Sufficient Potential For Coercion To Justify Application of *Miranda*'s Prophylactic Safeguards 14

B.

Respondent's Conversation With Undercover Agents Did Not Constitute Custodial Interrogation As Contemplated By *Miranda* 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Alexander v. State of Connecticut, 876 F.2d 277 (2nd Cir. 1989), *petition for cert. filed* (U.S. Sept. 25, 1989) (No. 89-510) 12

Arizona v. Mauro, 481 U.S. 520 (1987) 14, 19, 24

Arizona v. Roberson, ___ U.S. ___, 108 S.Ct. 2093 (1988) 14, 16

Beckwith v. United States, 425 U.S. 341 (1976) 17

Berkemer v. McCarty, 468 U.S. 420 (1984) 18, 19

Colorado v. Connelly, 479 U.S. 157 (1986) 18, 22

Colorado v. Spring, 479 U.S. 564 (1987) 21

Haynes v. Washington, 373 U.S. 503 (1963) 15

Hoffa v. United States, 385 U.S. 293 (1966) 12, 25

Holyfield v. State, 711 P.2d 834 (Nev. 1985) 12

Garner v. United States, 424 U.S. 648 (1976) 17

Kuhlmann v. Wilson, 477 U.S. 436 (1986) 14, 20

Lisemba v. California, 314 U.S. 219 (1947) 17

Lynumn v. Illinois, 372 U.S. 528 (1963) 20

Maine v. Moulton, 474 U.S. 159 (1985) 14

Mathis v. United States, 391 U.S. 1 (1968) 22

Michigan v. Jackson, 475 U.S. 625 (1986) 12

Michigan v. Tucker, 417 U.S. 433 (1974) 15

Miller v. California, 392 U.S. 616 (1968) (per curiam) 19

TABLE OF AUTHORITIES – Continued

Page

Miller v. Fenton, 474 U.S. 104 (1985) 22

Minnesota v. Murphy, 465 U.S. 420 (1984) 14, 16

Miranda v. Arizona, 384 U.S. 436 (1966) ..... *passim*

Moran v. Burbine, 475 U.S. 412 (1986)..14, 15, 16, 17, 21

New York v. Quarles, 467 U.S. 649 (1984).....15, 17

Oregon v. Elstad, 470 U.S. 298 (1985) 15, 17, 22

Oregon v. Mathiason, 429 U.S. 492 (1977) (per curiam) 20, 21, 23

People v. Aalbu, 696 P.2d 796 (Colo. 1985) (en banc) 12

People v. Williams, 44 Cal.3d 1127, 751 P.2d 901, *cert. denied*, ___ U.S. ___, 109 S.Ct. 514 (1988) 12

Procunier v. Atchley, 400 U.S. 446 (1971) 20

Rhode Island v. Innis, 446 U.S. 291 (1980) 13, 14, 18, 19, 22

Roberts v. United States, 445 U.S. 552 (1980).....11, 17

Rogers v. Richmond, 365 U.S. 534 (1961)..... 17

Spano v. New York, 360 U.S. 315 (1959) 20

State v. Calhoun, 479 So.2d 241 (Fla. App. 4th Dist. 1985)..... 12

State v. Fuller, 204 Neb. 196, 281 N.W.2d 749 (1979) 12

State v. McDonald, 387 So.2d 1116 (La.), *cert. denied*, 449 U.S. 957 (1980) 12

State v. Perkins, 753 S.W.2d 567 (Mo. App. 1988)..... 12

State v. Travis, 360 A.2d 548 (R.I. 1976)..... 12

United States v. Brown, 466 F.2d 493 (10th Cir. 1972) 12

TABLE OF AUTHORITIES – Continued

Page

United States v. Conley, 779 F.2d 970 (4th Cir. 1985), *cert. denied*, 479 U.S. 830 (1986) 20

United States v. Henry, 447 U.S. 264 (1980)..... 12

United States v. Russell, 411 U.S. 423 (1973)..... 23

United States v. Velasquez, 885 F.2d 1076 (3rd Cir. 1989)..... 21

United States v. Willoughby, 860 F.2d 15 (2nd Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 846 (1989) 12

CONSTITUTIONAL PROVISION

United States Constitution, Amendment V..... *passim*

OTHER

Kamisar, *Brewer v. Williams, Massiah* and *Miranda*: What is "Interrogation"? When Does It Matter?, 67 Geo. L.J.1 (1978)..... 13

Note, *Confusing the Fifth Amendment with the Sixth: Lower Court Misapplication of the* Innis *Definition Of Interrogation*, 87 Mich. L.R. 1073 (1989)..... 13

W.E. Ringel, *Searches and Seizures Arrests and Confessions*, §25.2(d) (2nd ed. 1986) 21

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, Fifth Judicial District, is set forth at page 1a of the Petition for Writ of Certiorari and is reported at *People v. Perkins*, 176 Ill. App. 3d 443, 531 N.E.2d 141 (5th Dist. 1988). The order of the Circuit Court of the 20th Judicial Circuit, St. Clair County, Illinois, is reproduced at page 11a of the petition and is not reported.

JURISDICTION

The judgment of the Appellate Court of Illinois, Fifth Judicial District, was entered on November 21, 1988, affirming the lower court's pretrial suppression of evidence on April 8, 1987. No petition for rehearing was filed and a timely petition for leave to appeal to the Illinois Supreme Court was denied on April 5, 1989. The Petition for Writ of Certiorari was filed June 2, 1989, and certiorari was granted October 2, 1989.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life,

liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Respondent was charged in the Circuit Court of the 20th Judicial Circuit, St. Clair County, Illinois, with the November 8, 1984, murder of Richard Stephenson. (C. 24) Prior to trial, he filed two Motions to Suppress, alleging that inculpatory statements he had made were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and the Fifth and Sixth Amendments. (J.A. 6-8)

At the hearing on respondent's motions before the Honorable John J. Hoban, it was established that 16 months after the initiation of a fruitless investigation into Stephenson's Fairview Heights, Illinois, murder, respondent was implicated in the crime by Donald Charlton. (J.A. 12-13, 62-63) Charlton, who was serving a 6-year sentence for burglary, had become friends with respondent during their incarceration together for 3½ months at the Graham Correctional Center in Hillsboro, Montgomery County, Illinois. (J.A. 61-62) At that time, respondent detailed for Charlton how two years before he had killed somebody in the East St. Louis area for $5,000. (J.A. 12, 62) Because Charlton believed that "[p]eople shouldn't kill people", he contacted a detective in the Spokane, Washington, Police Department who was his only acquaintance in law enforcement. (J.A. 63, 75) The detective in turn contacted an agent of the Illinois State Police, who passed the information along to the Fairview

Heights Police Department on March 4, 1986. (C. 10; J.A. 12, 63)

Fairview Heights Police Officer Stephen Walters, case agent on the Stephenson murder, conducted a background check on Charlton and held a taped interview with him at the Graham facility on March 14, 1986 (J.A. 11-13, 64, 76) Though he was told that authorities would make him no "deals" in exchange for his information, Charlton agreed to cooperate. (J.A. 22, 37, 63-66, 75-76) The information he provided significantly corroborated that which had surfaced during the initial investigation. (J.A. 12-13, 31)

When it was learned that respondent had been released from Graham Correctional Center on March 5, Charlton agreed to attempt communication with respondent while being monitored by an eavesdrop device. (J.A. 13, 64-65) Court orders authorizing Charlton's release from Graham and the use of electronic surveillance were obtained, and by March 25 the numerous efforts to contact respondent at his home in the Litchfield area had begun. (J.A. 13-14, 25-27, 31-33, 38-39, 65) At some point, his grandfather informed that respondent was out of town and would not return until Good Friday, March 28. (J.A. 26-27)

The following Saturday, March 29, Fairview Heights police were advised that respondent was being held at the Montgomery County Jail in Hillsboro on aggravated battery charges unrelated to the Stephenson murder. (J.A. 15, 33) Because they feared that the use of an eavesdrop device in the jail would prove impracticable and unsafe, Officer Walters and his supervisors determined that

undercover narcotics Agent John Parisi of the Metropolitan Enforcement Group should be incarcerated along with Charlton as a ruse to gain respondent's confidence. (J.A. 15-16, 23-24, 33-34, 40) At 5:30 p.m. Sunday, Walters, Parisi, and Charlton met to develop the story that Charlton and Parisi had escaped from a work release program, traveled to the Litchfield area to meet respondent, run out of money, committed burglaries, been arrested, and been thrown into jail. (J.A. 18, 41, 57, 66-67) Parisi briefly skimmed a transcript of Charlton's March 14 interview with Walters, but was unfamiliar with the details of the Stephenson murder. (J.A. 17-19, 35, 40, 42, 57-58, 67) Neither Parisi nor Charlton was told to question respondent about the murder, but just to engage him in conversation and relay any information obtained. (J.A. 17, 21-22, 24, 35, 44, 67)

At 8:10 p.m. Sunday night, Parisi and Charlton were placed in a cellblock of the Montgomery County Jail which contained four to five inmates and approximately twelve open cells leading to a larger room with a table. (J.A. 19, 43, 66, 68) Upon seeing each other, Charlton and respondent greeted and entered a private cell. (J.A. 45, 68) Thirty seconds later, Charlton called Parisi into the cell and introduced him as "Vito" to respondent. (J.A. 42, 45, 68) Parisi told respondent that they had just escaped from a work release program in the Chicago area, that he wasn't going to do any more time, and that he "needed to get out of there." (J.A. 45, 69) Respondent replied that the jail was "rinky dink", that he could have a gun smuggled in, and that the jailor was an elderly man who would be

alone and could be taken hostage. (J.A. 45, 69) Respondent then showed Parisi a crowbar hidden in the bathroom which could be used in the jail break. (J.A. 46, 69) The three decided to postpone further planning until the other inmates were asleep. (J.A. 46, 69)

At approximately 11:30 p.m., Parisi, Charlton and respondent met alone in the latter's back cell. (J.A. 47, 70) Respondent started out by saying he could have a .25 automatic pistol slipped in by his girlfriend on visiting day. (J.A. 47) Charlton responded "Hey, I'm not a murderer, I'm a burglar. That's your guys' profession." (J.A. 47-48, 70, 76) Parisi then asked if respondent had ever "done anybody", to which he replied affirmatively. (J.A. 48, 70-71) Parisi testified as follows from his notes summarizing the 35 minute conversation held with respondent:

> A. "Perkins: I can have a .25 automatic slipped in on visiting day, Tuesday, which would be April 1st, '86.
>
> The Informant: I don't want anything to do with anybody killing anyone.
>
> Q. Would that have been Mr. Charlton?
>
> A. Yes, it was.
>
> Q. Okay.
>
> A. Myself to Charlton: "Once we break out, if we have to kill anyone you are involved.
>
> Charlton: I know, but I don't want to do the killing, I'm a burglar. You guys are the killers.
>
> I then asked Perkins, "You ever do anyone? Yeah, once in East St. Louis, in a rich white neighborhood.

Informant: I didn't know they had any rich white neighborhoods in East St. Louis.

Perkins: It wasn't in East St. Louis, it was by a race track in Fairview Heights. That's about twelve miles from East St. Louis. Did you ever hear of Fairview Heights?" Asking me. I state, "Yes. You did a guy in Fairview Heights?

Perkins: Yeah in a rich white section where most of the houses look the same.

Charlton: If all the houses look the same, how did you know you had the right house?

Perkins: Me and two guys cased the house for about a week. I knew exactly which house, the second house on the left from the corner.

Myself: How long ago did this happen?

Perkins: Approximately about two years ago. I got paid $5,000 for that job.

Myself: How did it go down?

Perkins: I walked up to this guys' house with a sawed-off under my trench coat.

Myself: What type gun.

Perkins: A .12 gauge Remington Automatic Model 1100 sawed-off. They can't take ballistics from a shotgun. I rang the bell and the guy opened the door a little. It had a chain lock on it. He must have been afraid because his brother got the shit beat out of him a couple days ago with a baseball bat. He motioned for me to go to the garage. He must have thought I was a bum because I was wearing the trench coat.

Myself: How old was the dude?

Perkins: About 40. So the garage door starts to open and I ask the dude are you Steve, and he doesn't answer. So I wait until the garage gets about to his head.

Charlton: What kind of door was it?

Perkins: An automatic garage door. I know because I heard the motor." And then Perkins [started] humming.

"When the door got to his head, I asked him are you Steve. Still he didn't answer. He had one hand behind his back like he had a gun, so I clicked the safety off and pulled it from under my trench coat and shot him once in the leg. It was loud. Kaboom.

Charlton: Where did you shoot him?

Perkins: In the right leg." Perkins then touched Charlton in the right thigh area with his [hand].

Myself to Perkins: "What size shells did you use?

Perkins: Shrugs. I don't know what size. So when the dude's going down he called me a son-of-a-bitch. So I ejected the shell and was going to shoot him again, but about three or four little dogs were barking in the garage and the shot made a lot of noise, so I just started running.

Myself: How come you ejected the shell if it was an automatic?

Perkins: When I sawed it off I must have screwed up the gas cylinder.

Informant: I would have been afraid of witnesses.

Perkins: An old lady from across the street came out but I don't think she could recognize me because it was 8:30 at night and it was getting dark.

Myself: So you started running.

Perkins: Yeah, I had to run about three blocks and had to climb about an eight-foot ditch to get to the car.

Myself: How come the car wasn't close?

Perkins: Because we cased the house for about a week before in the car.

Myself: Who had the guy done?

Perkins: One of the guys in the car. He worked with him somehow.

Myself: What did he have him done for?

Perkins: Drugs and sex. He owed him money for drugs, and he was fucking his wife. I wasn't supposed to kill him, only cripple him, but he bled to death. Anyway, once I got to the car and was driving away, they were joking that I got the guy's brother and I would have to go back and shoot the right guy. Later we heard on the radio the guy died, and I thought, shit, I got one under my belt now. They asked me how I liked it, killing the guy, and I told them I enjoyed the shit out of it.

Informant: What did you do with the gun?

Perkins: I threw it over a four or five hundred foot cliff as you are going into Litchfield.

Informant: Into a pond?

Perkins: Something like that. Then I burned my trench coat, tennis shoes, and the Levis because they had blood all over them.

Informant: Aren't you afraid the guys in the car will talk? Perkins: No, I trust them with my life. They know I'll get the gas chamber but they will get life. One of the guys in the car said he had to take a lie detector test but he passed it. I've never been questioned on it, but I've got an alibi anyway, because one of the guys – cause me and one of the guys in the car went out that night with some girls. One of the girls was married and I got into a fight and got barred out of the tavern on purpose. That's it. Never heard anymore about it."

(J.A. 49-53) Charlton provided a corroborative account of the conversation, adding that respondent said he had received $2,500 as downpayment. (J.A. 71-73)

Subsequent to respondent's admissions, the three again talked about the escape and watched television until respondent went to sleep on the floor between his cell and the dayroom 15-20 minutes later. (J.A. 53, 73) Because Charlton did not trust respondent with the crowbar, he stayed up the rest of the night watching television and playing chess with Parisi. (J.A. 53, 73-74) At 9:00 a.m. Monday morning, Parisi and Charlton were taken out of the cellblock (J.A. 35, 53-54) Parisi told Charlton to prepare notes on everything they had heard, but the two did not compare their recollections with one another. (J.A. 36, 54-55, 73-74) Respondent's admissions were consistent with facts authorities had developed in their investigation of Stephenson's murder. (J.A. 36)

Officer Walters placed respondent under arrest for Stephenson's murder Monday, March 31, after he was brought over to the courthouse from the jail. (J.A. 19-21,

36-37) At that time respondent was given *Miranda* warnings and requested a lawyer. (J.A. 29, 37) The criminal complaint and arrest warrant were signed late March 31st and filed on April 1. (C. 2; J.A. 4-5, 21, 28-29)

Based upon the above facts, petitioner argued, *inter alia*, that respondent was not subjected to custodial interrogation so as to trigger *Miranda*. (C. 79-80) On April 8, 1987, the Honorable Richard A. Hudlin IV entered an order prohibiting Parisi and Charlton from testifying to respondent's Montgomery County Jail statements because he was questioned by governmental agents while in custody and without being given *Miranda* warnings. (C. 69)

On petitioner's pretrial appeal pursuant to Ill. Rev. Stat. 1987, ch. 110A, para. 604(1), the sole issue raised was whether *Miranda* was violated. In a decision issued November 21, 1988, the Appellate Court of Illinois, Fifth Judicial District, held that *Miranda* prohibits all undercover contacts with incarcerated suspects which are reasonably likely to elicit an incriminating response. *People v. Perkins*, 176 Ill. App. 3d 443, 531 N.E.2d 141 (5th Dist. 1988). The Illinois Supreme Court denied petitioner leave to appeal April 5, 1989.

SUMMARY OF THE ARGUMENT

A. In order to dispel the inherently compelling pressures of custodial interrogation, *Miranda v. Arizona*, 384 U.S. 436 (1966), created prophylactic safeguards for the Fifth Amendment privilege against compulsory self-incrimination which ensure that any waiver of the

privilege will be both voluntary and knowing. These safeguards, however, serve to frustrate law enforcement's legitimate efforts in securing statements through constitutionally permissible means. Accordingly, *Miranda* "does not apply outside the context of inherently coercive interrogations for which it was designed." *Roberts v. United States*, 445 U.S. 552, 560 (1980). If an inmate is unaware that he is communicating with a government agent, the most significant source of potential coercion identified by *Miranda* – mutually reinforcing manifestations of police dominance – does not exist. Nor could pressures arise from a perception that the agent directly influences any other facit of governmental power. Because the undercover technique significantly mitigates the pressures which may come to bear on a suspect to speak, application of *Miranda* is unwarranted.

B. Even if *Miranda* could be properly invoked to prohibit some undercover scenarios, respondent was not subjected to custodial interrogation here because the record affirmatively establishes that his statements were elicited without compelling pressures which could potentially have arisen from incarceration and questioning.

ARGUMENT

MIRANDA DOES NOT PROHIBIT THE USE OF UNDERCOVER AGENTS TO ELICIT STATEMENTS FROM INCARCERATED SUSPECTS PARTICULARLY WHERE, AS HERE, THE ENCOUNTER IS DEVOID OF COMPELLING INFLUENCES.

This Court has not resolved the question of whether *Miranda v. Arizona*, 384 U.S. 436 (1966), applies in full

force when undercover agents initiate conversations with incarcerated suspects.[1] However, in finding that the Sixth Amendment right to counsel prohibits the use at trial of post-indictment statements deliberately elicited by an informant, this Court in *United States v. Henry*, 447 U.S. 264 (1980), left unmodified it's position in *Hoffa v. United States*, 385 U.S. 293 (1966), that the Fifth Amendment is not "implicated by the use of undercover Government agents before charges are filed because of the absence of the potential for compulsion." *Henry*, 447 U.S. at 272. Further, this Court in *Michigan v. Jackson*, 475 U.S. 625, 632 (1986), observed that the surreptitious employment of a cellmate may violate the Sixth Amendment right to counsel "even though the same method[ ] of investigation

---

[1] The lower court here held *Miranda* to prohibit all undercover activities which authorities should know are reasonably likely to elicit incriminating responses from an inmate. *People v. Perkins*, 176 Ill. App. 3d 443, 531 N.E.2d 141 (5th Dist. 1988). *See also State v. Fuller*, 204 Neb. 196, 281 N.W.2d 749 (1979); *State v. Travis*, 360 A.2d 548 (R.I. 1976); *Holyfield v. State*, 711 P.2d 834 (Nev. 1985); *State v. Calhoun*, 479 So.2d 241 (Fla. App. 4th Dist. 1985); *State v. Perkins*, 753 S.W.2d 567 (Mo. App. 1988); *United States v. Brown*, 466 F.2d 493 (10th Cir. 1972). *Contra People v. Williams*, 44 Cal.3d 1127, 751 P.2d 901, *cert. denied*, ___ U.S. ___, 109 S.Ct. 514 (1988) (*Miranda* inapplicable to conversations between inmates and undercover agents); *State v. McDonald*, 387 So.2d 1116 (La.), *cert. denied*, 449 U.S. 957 (1980) (same where encounter not "intimidating"); *People v. Aalbu*, 696 P.2d 796 (Colo. 1985) (en banc) (same); *United States v. Willoughby*, 860 F.2d 15 (2nd Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 846 (1989) (same). Without citing *Willoughby*, the second circuit subsequently held that *Miranda* prohibits an inmate's "friend" from offering to dispose of incriminating evidence. *Alexander v. State of Connecticut*, 876 F.2d 277 (2nd Cir. 1989), *petition for cert. filed* (U.S. Sept. 25, 1989) (No. 89-510).

might have been permissible before arraignment or indictment." Finally, in noting that the definitions of "interrogation" under the Fifth and Sixth Amendments are not necessarily interchangeable due to the distinct policies underlying the two constitutional protections, this Court in *Rhode Island v. Innis*, 446 U.S. 291, 300, n. 4 (1980), cited Kamisar, *Brewer v. Williams, Massiah* and *Miranda*: What is "Interrogation"? When Does it Matter?, 67 Geo L.J. 1 (1978), which argues that *Miranda* should not be automatically invoked to prohibit the use of undercover agents in eliciting incriminating statements from incarcerated suspects. *See also* Note, *Confusing the Fifth Amendment with the Sixth: Lower Court Misapplication of the* Innis *Definition Of Interrogation*, 87 Mich. L.R. 1073 (1989) (questioning of inmate by undisclosed government agent outside scope of *Miranda*). It is petitioner's position that application of *Miranda* in the context of any undercover investigation would sacrifice effective law enforcement techniques in the name of a constitutional guarantee which has not likely even been jeopardized. Clearly more unwarranted is the lower court's application of *Miranda* to facts affirmatively demonstrating the absence of any compelling influences which could have come to bear on respondent.[2]

---

[2] With the exception of a conclusory invocation of the Sixth Amendment at the trial level (J.A. at 8), respondent has not raised Sixth Amendment concerns to date and the Illinois courts ruled exclusively on his Fifth Amendment claim.

There is no evidence in the record that at the time respondent made statements to undercover agents implicating himself in the murder he had been formally charged with aggravated

(Continued on following page)

A.

Inmate Encounters With Persons They Do Not Know To Be Government Agents Do Not Carry Sufficient Potential For Coercion To Justify Application of *Miranda*'s Prophylactic Safeguards.

Prior to *Miranda*, the admissibility of a defendant's in-custody statements was judged solely by whether they were "voluntary" within the meaning of the Due Process Clause, which proscribed the use of statements obtained by unduly offensive methods or "under circumstances in

---

(Continued from previous page)

battery, had previously requested counsel, or had previously invoked his right to silence. Even if these facts could be established, however, they could not support a Sixth Amendment claim because it is undisputed that respondent had not yet been formally or informally charged with murder. *See Maine v. Moulton*, 474 U.S. 159, 180, n. 16 (1985) (statements obtained in violation of Sixth Amendment right to counsel must be excluded only from trial of offense as to which the right has attached); *Moran v. Burbine*, 475 U.S. 412, 431 (1986) (same); *Kuhlmann v. Wilson*, 477 U.S. 436, 458, n. 21 (1986) (same). Nor could they affect petitioner's argument regarding the Fifth Amendment, which stresses the coercion-prevention measures outlined in *Miranda* to be wholly unnecessary during undercover encounters. *See Minnesota v. Murphy*, 465 U.S. 420, 424, n. 3 (1984) (request for lawyer irrelevant because suspect was not "in custody" and had no right to attorney's presence); *Rhode Island v. Innis*, 446 U.S. 291, 298, n. 2 (1980) (request for lawyer irrelevant because suspect was not "interrogated"); *Arizona v. Mauro*, 481 U.S. 520 (1987) (same). *Compare Arizona v. Roberson*, ___ U.S. ___, 108 S.Ct. 2093 (1988) (invocation of Fifth Amendment right to counsel by one in custody prohibits police from initiating "custodial interrogation" concerning even separate crimes).

which the suspect clearly had no opportunity to exercise 'a free and unconstrained will.'" *Oregon v. Elstad*, 470 U.S. 298, 304 (1985) (quoting *Haynes v. Washington*, 373 U.S. 503, 514 (1963)). In *Miranda*, this Court for the first time extended the Fifth Amendment privilege against compulsory self-incrimination to individuals subjected to custodial interrogation by the police. *New York v. Quarles*, 467 U.S. 649, 654 (1984). It reasoned that "[t]he potentiality for compulsion is forcefully apparent" in the interrogation environment, which is "created for no purpose other than to subjugate the individual to the will of his examiner" by isolating the suspect in an unfamiliar, police-dominated atmosphere and subjecting him to "menacing police interrogation procedures." *Miranda*, 384 U.S. at 457. This Court further determined that "[i]n order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Id.* at 467. *Miranda* therefore required that statements elicited during custodial interrogation be shown voluntary and be given "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

To effectuate this mandate, which provides "practical reinforcement" for the Fifth Amendment right, *Miranda* established specific protective guidelines impacting both the voluntary and knowing nature of a suspect's decision to speak. *Michigan v. Tucker*, 417 U.S. 433, 443-44 (1974). Observing that an individual in custody may believe that interrogation will continue until a confession is obtained

or that silence in the face of accusation will bode ill for his trial, *Miranda* held that prior to questioning he must be clearly informed that he has a right to remain silent. *Miranda*, 384 U.S. at 468. Further, because "[t]he circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators", the suspect must be clearly informed that even though indigent he has the right to consult with a lawyer before and during any questioning. *Id.* at 469-73. *Miranda* also dictates that once a suspect in custody indicates a desire to remain silent, interrogation must immediately cease, and once he requests counsel, further custodial interrogation cannot be initiated by authorities. *Arizona v. Roberson*, ___ U.S. ___, 108 S.Ct. 2093 (1988). Finally, *Miranda* requires that the subject be adequately informed of the consequences of foregoing the privilege against compulsory self-incrimination. *Miranda*, 384 U.S. at 469. *Miranda* thus sought to give the suspect "the power to exert some control over the course of the interrogation", *Burbine*, 475 U.S. at 426, control which would not likely be otherwise perceived because the common belief that in the face of official accusation one must speak to avoid continued harassment, or other harm at the hands of government, is reinforced by the suspect's isolation in an unfamiliar, police-dominated atmosphere from which he cannot physically escape. *Minnesota v. Murphy*, 465 U.S. 420, 433 (1984).

The majority in *Miranda* did not quarrel with the prediction that its rules would markedly decrease the number of confessions available to law enforcement, *see Miranda*, 384 U.S. at 516-17 (Harlan, J., with whom Stewart, J., and White, J., join, dissenting), but struck a balance

in favor of the Fifth Amendment where "there exists a substantial risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion." *Burbine*, 475 U.S. at 426. This balance, however, is a "subtle" one, for it must accommodate the undoubted need for police questioning in pursuit of "society's compelling interest in finding, convicting, and punishing those who violate the law." *Id.* Accordingly, though the Fifth Amendment has been explicitly extended to all official encounters, this Court has repeatedly admonished that *Miranda*'s "extraordinary safeguard 'does not apply outside the context of the inherently coercive interrogations for which it was designed.' " *Murphy*, 465 U.S. at 426, 430 (quoting *Roberts v. United States*, 445 U.S. 552, 560 (1980)). Rather, unless circumstances constitute "custodial interrogation" as contemplated by *Miranda*, a knowing waiver of the Fifth Amendment privilege is not required, *Garner v. United States*, 424 U.S. 648, 654, n.9 (1976), and the voluntary nature of statements remains properly judged by due process standards, *Elstad*, 470 U.S. at 307-08, which focus on governmental deprivation of the individual's "free choice to admit, to deny, or to refuse to answer." *Garner*, 424 U.S. at 657 (quoting *Lisemba v. California*, 314 U.S. 219, 241 (1947)). *See also Beckwith v. United States*, 425 U.S. 341, 348 (1976) (statements elicited during non-custodial interrogation rendered involuntary only where "the behavior of . . . law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined") (quoting *Rogers v. Richmond*, 365 U.S. 534, 544 (1961)). *Cf. New York v. Quarles*, 467 U.S. 649, 655, n. 5 (1984) (though there

exists a public safety exception to *Miranda*, defendants may argue statements coerced "under traditional due process standards.")[3]

Miranda defines custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any significant way." 384 U.S. at 444. This Court has since adopted or rejected the *Miranda* prophylaxis in a particular context by variously interpreting "custody" and "interrogation" in light of the reasonably foreseeable perceptions and reactions of the suspect. *See, e.g., Berkemer v. McCarty*, 468 U.S. 420, 440, 442 (1984) (individual temporarily detained pursuant to ordinary traffic stop not "in custody" regardless of officer's unarticulated plan to effectuate formal arrest); *Rhode Island v. Innis*, 446 U.S. 291, 302 (1980) (officers' conversation in presence of arrestee not "interrogation" where they should not have known it was reasonably likely to elicit

---

[3] In *Colorado v. Connelly*, 479 U.S. 157, 170 (1986), this Court reiterated that "[t]he sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion", and held that an express waiver of *Miranda* rights which is voluntary under the Due Process Clause will also be deemed voluntary for purposes of the Fifth Amendment. If governmental actions instill or intensify the perceived negative consequences of silence, or heighten the perceived positive consequences of speaking, they may operate to reduce the subject's perceived practical options to one of speaking. However, if the government merely militates against any perceived negative consequences of speaking, its behavior carries no coercive attributes because the option of silence remains unaffected. To constitute impermissible coercion, governmental conduct must amount to "overreaching". *Id.*

an incriminating response). However, consistent with its position that "[f]idelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated", *McCarty*, 468 U.S. at 437, this Court has recognized that *Miranda* was founded upon "the *interplay* of interrogation and custody", *Innis*, 446 U.S. at 299 (emphasis supplied), and that the ultimate question to be resolved is whether the scenario at issue "exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights." *McCarty*, 468 U.S. at 437.

What, then, are the pressures impairing free choice which will likely come to bear on an inmate conversing with an undisclosed government agent? It is a given that the suspect is incarcerated and may thereby suffer heightened anxieties exacerbated by alienation from friends and family. *See Miller v. California*, 392 U.S. 616, 624 (1968) (per curiam) (Marshall, J., with Warren, C.J., Douglas and Brennann, J.J., dissenting from dismissal of certiorari) ("petitioner was in custody without bail, with a consequent lack of freedom to choose her companions"). However, as made clear in *Innis*, 446 U.S. at 300-01, and later in *Arizona v. Mauro*, 481 U.S. 520, 526 (1987), *Miranda* is not triggered solely by pressures "normally attendant to arrest and custody" even when coupled with immediate police presence of which the suspect is aware. It may also be presumed that undercover agents will initiate and actively participate in their encounter with the subject while harboring the hope that incriminating statements will be forthcoming. But again, *Miranda* is not triggered

solely by police-initiated questioning even when the officer's identity and purpose are known to the suspect and even where the officer has falsely exaggerated the evidence of guilt against him. *See Oregon v. Mathiason*, 429 U.S. 492 (1977) (per curiam).[4] Finally, it is a given that the inmate is being "tricked" and that *Miranda* was critical of deceptive techniques employed by the police. *See Miranda*, 384 U.S. at 453-54. But the forms of trickery detailed there (staged lineups wherein the subject is falsely identified and official advice that silence will reflect guilt or place stress on family and finances) all tend to instill or reinforce in the suspect's mind the negative consequences of remaining silent. *See also Spano v. New York*, 360 U.S. 315 (1959); *Lynumn v. Illinois*, 372 U.S. 528 (1963). Some forms of trickery, on the other hand, will not carry coercive attributes even when accomplished in a jail or prison. *See, e.g., Procunier v. Atchley*, 400 U.S. 446, 454 (1971) ("The circumstances that the conversation was recorded without the respondent's knowledge did not tend to show either actual coercion or a potentially coercive setting."). *Cf. Kuhlmann v. Wilson*, 477 U.S. 436, 457-59 (1986) (surreptitious employment of cellmate as a "listening post" does not constitute "deliberate elicitation" for purposes of the Sixth Amendment).[5]

---

[4] Recognition of the unique considerations arising in the investigation of prison crimes has deterred some courts from applying *Miranda* when, though an inmate is subjected to official questioning concerning such offenses, the interview itself does not restrict his freedom of movement. *See, e.g., United States v. Conley*, 779 F.2d 970 (4th Cir. 1985), *cert denied*, 479 U.S. 830 (1986).

[5] Lower courts have found that affirmative police deception will not necessarily invalidate a confession though it was

(Continued on following page)

Indeed, the deception inherent in undercover work actually serves to dispel the most significant source of potential coercion identified by *Miranda* – mutually reinforcing manifestations of police dominance. If a suspect is unaware that he is being confronted by a government agent, he will not be motivated to speak out of concern that the agent is part of a law enforcement system charged with unrelenting investigation from which "he cannot literally escape." *Murphy*, 465 U.S. at 433. Nor would he perceive a need to ingratiate himself with a law enforcement system which manages his physical environment, which "may ultimately cause the suspect to be charged with a crime", *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam), and which might seek to capitalize on his lack of cooperation to the suspect's detriment at trial. Further, other forms of pressure are less likely to occur because the suspect does not perceive an

---

(Continued from previous page)

elicited in a context clearly requiring a knowing and intelligent waiver of rights under *Miranda*. *See, e.g., United States v. Velasquez*, 885 F.2d 1076 (3rd Cir. 1989). *See generally* W.E. Ringel, *Searches and Seizures Arrests and Confessions*, § 25.2(d) (2nd ed. 1986). The issue was left open in *Colorado v. Spring*, 479 U.S. 564 (1987), where this Court held that mere silence by law enforcement officials as to the subject matter of an interrogation does not constitute impermissible "trickery". *See also Moran v. Burbine*, 475 U.S. 412 (1986) (failure to inform suspect of attorney's efforts to reach him).

undercover agent to wield *any* power of the government[6] and because neither the agent nor identified police personnel will attempt to play upon hopes and fears in a manner which would risk disclosure of the agent's identity. Undercover investigations thus enhance the chances that statements will be the product either of pressure-free encounters or of " 'moral and psychological pressures to confess emanating from sources other than official coercion' " with which "the Fifth Amendment privilege is not concerned." *Colorado v. Connelly*, 479 U.S. 157, 170 (1986) (quoting *Oregon v. Elstad*, 470 U.S. 298, 305 (1985)).

To be sure, it is possible to envision undercover scenarios which subsequent to arrest arguably " 'either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned.' " *Id.* at 163 (quoting *Miller v. Fenton*, 474 U.S. 104, 109 (1985)). An agent posing as a defense attorney, for example, could rely on a suspect's need for legal advice in eliciting admissions. And an agent posing as a priest could exploit a particular suspect's need for religious absolution. But the legality of these and any other workable techniques will principally turn on the role being played by the agent rather than how that role is played, and they will

---

[6] In *Mathis v. United States*, 391 U.S. 1 (1968), an IRS agent questioned an inmate as part of a routine tax investigation unrelated to the offense for which he was incarcerated. Over the dissent of three justices, this Court held *Miranda* warnings to be required. The government admittedly maintains extensive control over numerous and varied aspects of its citizens' lives independent of criminal law enforcement. Yet no motive directly associated with this power, including the conscience-ridden suspect's concern for the safety of children in *Innis*, could arise if a government agent's status is unknown to the suspect.

thus lend themselves to relatively clear-cut rules governing undercover work. More importantly, the mere risk of impermissible police activity should not automatically call into question the admissibility of statements which will generally be secured under conditions holding far less potential for coercion than the stationhouse questioning at issue in *Mathiason*, and far less potential for offending than the significant undercover police involvement in illicit drug manufacture sanctioned in *United States v. Russell*, 411 U.S. 423 (1973).[7]

The court below was simply wrong in its conclusion that by employing undercover agents against incarcerated suspects the government is doing indirectly what it cannot do directly under *Miranda*. *People v. Perkins*, 176 Ill. App. 3d 443, 449, 531 N.E.2d 141, 145 (5th Dist. 1988). What it cannot do directly is subject suspects to the inherently compelling pressures of custodial interrogation without adequate safeguards. Yet the very fact that government involvement is unknown to the suspect significantly mitigates potential pressures rendering application of *Miranda* unnecessary.

---

[7] In *Russell*, this Court rejected not only a due process challenge but a non-constitutional entrapment defense, noting that there are circumstances when the use of deceit is the only practicable law enforcement technique available. 411 U.S. at 436. These circumstances will clearly arise in the context of crimes committed in a jail or prison, where potential witnesses may fear retaliation for communicating with authorities.

B.

Respondent's Conversation With Undercover Agents Did Not Constitute Custodial Interrogation As Contemplated By *Miranda*.

Even if the prophylactic safeguards of *Miranda* could be properly invoked to deny admission of some statements elicited by undercover agents, to apply *Miranda* on the undisputed facts here would farcically exploit this Court's well-intended goal of "preventing government officials from using the *coercive* nature of confinement to *extract* confessions that would not be given in an unrestrained environment." *Arizona v. Mauro*, 481 U.S. 520, 529-30 (1987) (emphasis supplied).

Respondent was confined in a cellblock of the Montgomery County Jail containing approximately twelve open cells which led to a larger room with a table. Immediately upon being introduced to Agent Parisi by Charlton, respondent expressed his view that the jail was "rinky dink", showed Parisi a crowbar hidden in the bathroom which could be used in a jail break, declared that he could arrange to have someone smuggle in a gun, and suggested that the elderly jailor could easily be taken hostage. Respondent's confession to victim Stephenson's murder was given during an escape-planning session held by agreement with his perceived confederates in secrecy after other inmates were asleep. Further, Parisi's initial inquiry as to whether respondent had ever killed anyone carried no objective import other than its tangential relevance to the escape. And subsequent questions to which the suspect responded revealed no more than a professionally-based curiosity on the part of "killer" Parisi. Finally, there is no hint that respondent was unusually

susceptible to any form of persuasion other than appeals to his boredom, ill-conceived notions of self-accomplishment, or criminal nature.

Faced with the record here, respondent expressly declined to argue below that Parisi and Charlton subjected him to an "interrogation environment". Indeed, neither respondent nor the court below identified any *potentially* coercive attributes of the encounter other than the existence of police-initiated discussions with an incarcerated subject.[8] In truth, that respondent made incriminating statements reflects no more than a wholly unjustifiable "misplaced confidence" in whom he believed to be co-conspirators. *Hoffa v. United States*, 385 U.S. 293, 413 (1966). At the same time, there existed particular need for the investigative technique employed inasmuch as authorities had fruitlessly pursued an investigation into victim Stephenson's murder for 1½ years and, once learning from an inherently impeachable source that respondent may have been involved in the offense, law enforcement attempted an undercover street

---

[8] The lower court, without elaboration, found that "the placement of Parisi in the cellblock with the defendant, and Parisi's inquiry whether the defendant had ever 'done someone' were words and actions reasonably likely to elicit an incriminating response from the defendant." *People v. Perkins*, 176 Ill. App. 3d 443, 447, 531 N.E.2d 141, 144 (5th Dist. 1988). If this is so, it is not because respondent could have felt any pressure to speak, but only because he had already gratuitously confessed to Charlton during their incarceration together at another facility.

investigation which became a jail investigation only because respondent had been incarcerated for another crime. The subtle balance struck by *Miranda* would be severely disrupted by its application to the facts presented here.

CONCLUSION

For the foregoing reasons, the People of the State Illinois respectfully request that the decision of the Appellate Court of Illinois, Fifth Judicial District, be reversed.

NEIL F. HARTIGAN
Attorney General of Illinois

ROBERT J. RUIZ
Solicitor General of Illinois

TERENCE M. MADSEN

MARCIA L. FRIEDL*
JACK DONATELLI
Assistant Attorneys General
100 W. Randolph St.,
12th Floor
Chicago, Illinois 60601
(312) 814-2127

Counsel for Petitioner

*Counsel of Record